Supreme Court, U.S.
F I L E D
DEC 18 1997
CLERK

No. 97-820

In The Supreme Court of the United States

OCTOBER TERM 1997

JACK P. BRIGMAN,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION

E. Duncan Getchell, Jr., ***Counsel of Record***
Robert L. Hodges
McGUIRE, WOODS, BATTLE & BOOTHE, L.L.P.
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 775-4319

Counsel for Respondent

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

22pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the dismissal of a case brought in a Virginia Circuit Court under the Federal Employers' Liability Act ("FELA") on *forum non conveniens* grounds under Va. Code § 8.01-265 discriminatory against federal claims in violation of the Supremacy Clause, U.S. Const., art. VI, cl. 2?

2. Does the United States Supreme Court's holding that residency and citizenship are interchangeable "in most cases" for purposes of the Privileges and Immunities Clause, U.S. Const., art. IV, § 2, cl. 1, impliedly overrule the Court's line of cases approving the nondiscriminatory application of *forum non conveniens* to FELA cases?

3. Can the reference to Va. Code § 8.01-249(4) in Va. Code § 8.01-265 be read under its plain language, or under any applicable canons of construction, to extend to actions brought pursuant to the FELA?

PARTIES TO THE PROCEEDINGS BELOW AND DISCLOSURE UNDER SUP.CT.R. 29.6

Jack P. Brigman, Petitioner, was plaintiff in the court below. CSX Transportation, Inc., the defendant below, is a wholly owned subsidiary of CSX Corporation, a publicly traded company. There are no non-wholly owned subsidiaries or affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

1. The Application of Virginia's *forum non conveniens* Statute is Not Discriminatory Against Either Federal Causes of Action or Non-Residents in Violation of the Constitution. 3

a. The nondiscriminatory application of *forum non conveniens* to FELA cases in state court does not violate the Supremacy Clause. 3

b. The Virginia statute does not violate the Privileges and Immunities Clause because the constitutionality of *forum non conveniens* does not rest on any distinction between "residents" and "citizens". 6

c. Unlike the law in *Russell v. CSX Transportation, Inc.*, the Virginia statute is a neutral application of the principle of *forum non conveniens.* 8

d. Approval of the nondiscriminatory application of *forum non conveniens* to FELA cases brought in state court is a settled issue and Brigman has raised no grounds for revisiting established case law. 9

2. The Limitation on the Discretion of the Court in Va. Code § 8.01-265 with Respect to Certain Actions by Nonresidents Does Not Discriminate Against Federal Causes of Action. 10

3. No Reasonable Construction of Va. Code § 8.01-249(4) Can Bring Claims Under the Federal Employers Liability Act Within its Terms. 12

CONCLUSION 13

TABLE OF AUTHORITIES

FEDERAL CASES

American Dredging Co. v. Miller, 510 U.S. 443 (1994) 2, 6

Ex parte Collett, 337 U.S. 55 (1949) 12

Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377 (1928) 2, 5

Emmons v. Southern Pacific Transport Co., 701 F.2d 1112 (5th Cir. 1983) 13

Herb v. Pitcairn, 324 U.S. 117 (1945) 5, 11

Howlett v. Rose, 496 U.S. 356 (1990) 4, 5

Koster v. Lumbermens Mutual Casualty Co., 330 U.S. 518 (1947) 7

Missouri ex rel. Southern Railway v. Mayfield, 340 U.S. 1 (1950) 2, 5, 12

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) 6, 7

Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) 7

Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988) 7

Townley v. Norfolk and W. Railway Co., 887 F.2d 498 (4th Cir. 1989) 13

United Building and Const. Trades Council of Camden and Vicinity v. Mayor and City of Camden, 465 U.S. 208 (1984) 6

STATE CASES

Atchison, Topeka & Santa Fe Railway Co. v. District Court, 298 P.2d 427 (Okla.), *cert. denied*, 352 U.S. 879 (1956) 10

Caldwell v. Seaboard System R., Inc., 238 Va. 148, 380 S.E.2d 910 (1989), *cert. denied*, 493 U.S. 1095 (1990) 13

Great N. Railway Co. v. Superior Court, 90 Cal. Rptr. 461 (Cal.App. 1970), *cert. denied sub nom.*, Curtin v. Superior Court, 401 U.S. 1013 (1971) 10

Missouri Pacific R. Co. v. Tircuit, 554 So. 2d 878 (Miss. 1989) 9

Norfolk and W. Railway Co. v. Williams, 239 Va. 390, 389 S.E.2d 714 (1990) 12

Norfolk and Western Railway Co. v. Tsapis, 400 S.E.2d 239 (W. Va. 1990) 9

Price v. Atchison, Topeka & Santa Fe Railway Co., 268 P.2d 457 (Cal.), *cert. denied*, 348 U.S. 839 (1954) 10

Russell v. CSX Transportation, Inc., 689 So.2d 1354 (La. 1997) 2, 8, 9

Vargas v. A.H. Bull S.S. Co., 135 A.2d 857 (N.J. 1957), *cert. denied*, 355 U.S. 958 (1958) 10

FEDERAL CONSTITUTION AND STATUTES

Privileges and Immunities Clause, U.S. Const., art. IV, § 2, cl.2 2

Supremacy Clause, U.S. Const., art. VI, cl.2 2

28 U.S.C. § 1404(a) 12

Federal Employers Liability Act , 45 U.S.C. § 51 et seq ..... passim

STATE STATUTES

Va. Code § 8.01-243 11

Va. Code § 8.01-249(4) 2, 10, 11, 12, 13

Va. Code § 8.01-265 ..... 1, 2, 4, 10, 12, 13

OTHER AUTHORITIES

Annotation, *Forum Non Conveniens: Circumstanc[illegible] Justifying State Court's Refusal to Take Jurisdiction of Federal Employers Liability Act Proceeding*, 60 A.L.R. 3d 964 (1974 & Supp. 1996) 10

Annotation, *Power of a state or state court to decline jurisdiction of action under Federal Employers Liability Act*, 43 A.L.R. 2d 774 (1955 & Supps. 1992, 1996) 10

No. 97-820

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

JACK P. BRIGMAN,

Petitioner,

v.

CSX TRANSPORTATION, INC.

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

This case is an attack on the constitutionality, both facially and as applied, of Va. Code § 8.01-265, the Commonwealth of Virginia's codification of the doctrine of *forum non conveniens*. Appellant Jack P. Brigman filed a Motion for Judgment pursuant to the Federal Employers Liability Act , 45 U.S.C. § 51 *et seq*., in the Circuit Court of the City of Portsmouth, Virginia, against CSX Transportation, Inc. Brigman alleged personal injuries proximately caused by exposure to various chemical solvents and asbestos dust during his employment in North Carolina.

Brigman was a carman employed by CSX in its Hamlet, North Carolina shops from 1971 to 1995. He is not a resident of Virginia, and was not a resident of Virginia at

any time relevant to this case. He did not work in Virginia and was not employed by CSX at any of its facilities in Virginia. The exposure from which his injuries allegedly arose did not occur in Virginia. Brigman's case has no nexus at all to Virginia except that he retained Virginia counsel and as a result of that representation was examined by Virginia physicians selected by his counsel.

Because of the lack of any nexus with Virginia and the availability of a more convenient forum elsewhere, CSX moved to dismiss pursuant to the *forum non conveniens* provision of the Code of Virginia, Va. Code § 8.01-265. After briefing, the taking of evidence and arguments of counsel, the trial court below granted CSX's motion. Brigman petitioned the Supreme Court of Virginia for a writ of error to the trial court. After briefing and argument, the Supreme Court denied Brigman's petition. Brigman now seeks a writ of certiorari to the Supreme Court of Virginia.

SUMMARY OF THE ARGUMENT

Petitioner has presented this case as one involving "facts identical" to *Russell v. CSX Transportation, Inc.*, 689 So.2d 1354 (La. 1997), as well as "arguments identical", and alleges that the decision below represents a conflict with Russell on a constitutional issue. In fact, the *Russell* case raised an entirely different question. *Russell* involved explicit state law discrimination against causes of action arising under federal law. This case involved a neutral application of *forum non conveniens* principles in the manner long approved by the precedents of this Court.

As recently as 1994, in *American Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994), the Court reaffirmed its holding in *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5 (1950), that a state court presiding over an action brought under the FELA was free to decide the applicability of *forum non conveniens* under its own local law. Petitioner seeks to reopen an issue frequently litigated in the past but long since foreclosed by controlling decisions in this Court. In decisions from *Douglas v. New York, N.H. & H.R. Co.*,

279 U.S. 377 (1928), through *Mayfield* to *American Dredging Co. v. Miller*, this Court has consistently held that there is no constitutional violation in a state's neutral application of *forum non conveniens* principles to cases filed in its courts.

Petitioner can advance his argument only through a selective misreading of the case law. Petitioner's attempts to argue by analogy from cases involving unrelated areas of the law is clearly due to be rejected when there are decisions directly on point. Petitioner attempts to color the limited exception in the Virginia statute common law personal injury claims for exposure to asbestos as somehow implicating the statutory provisions of the FELA. There are no sound principles of statutory construction that can support this view. The decision of the Virginia General Assembly to limit the discretion of the Virginia courts in their application of *forum non conveniens* is still the application of local law permitted under *Mayfield*.

This Court has settled the issue that the neutral application of *forum non conveniens* is constitutionally permissible. Nothing was done here that has not long since been found permissible, and the petition for certiorari should be denied.

ARGUMENT

1. The Application of Virginia's *forum non conveniens* Statute is Not Discriminatory Against Either Federal Causes of Action or Non-Residents in Violation of the Constitution.

a. The nondiscriminatory application of *forum non conveniens* to FELA cases in state court does not violate the Supremacy Clause.

The Court has repeatedly recognized that a State can apply objectively neutral criteria to decline to entertain certain cases on *forum non conveniens* grounds. There is no

discrimination in Va. Code § 8.01-265 against FELA cases. Instead, the statute fits squarely within the exceptions recognized by the Court as nondiscriminatory under Supremacy or Privileges and Immunities Clause grounds.

The Court summarized its Supremacy Clause jurisprudence is this area as follows:

> When a state court refuses jurisdiction because of a neutral state rule regarding administration of the courts, we must act with utmost caution before deciding it is obligated to entertain the claim. The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule, "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." The States thus have great latitude to establish the structure and jurisdiction of their own courts. In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law.

Howlett v. Rose, 496 U.S. 356, 372 (1990) (citations omitted). The Court then reiterated the validity of its prior decisions on state court treatment of FELA claims.

> On only three occasions have we found a valid excuse for a state court's refusal to entertain a federal cause of action. Each of them involved a neutral rule of judicial administration. In *Douglas v. New York, N.H. & H.R. Co.*, the state statute permitted discretionary dismissal of both federal and state claims where neither the plaintiff nor the defendant was a resident of the forum state.

> In *Herb [v. Pitcairn*, 324 U.S. 117 (1945)], the City court denied jurisdiction over a FELA action on the grounds that the cause of action arose outside its territorial jurisdiction. Although the state court was not free to dismiss the federal claim "because it was a federal one," we found no evidence that the state courts "construed the state jurisdiction and venue laws in a discriminatory fashion. Finally, in *Mayfield*, we held that a state court could apply the doctrine of *forum non conveniens* to bar adjudication of an FELA case if the State "enforces its policy impartially so as not to involve a discrimination against Employers' Liability Act suits."

Id. at 374-75 (citations omitted). Indeed, the Court reemphasized its holding in *Douglas*, 279 U.S. at 387, cited also by the Court in *Herb v. Pitcairn*, that:

> As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it but only to empower them to do so, so far as the authority of the United States is concerned... But there is nothing in the Act of Congress that purports to force a duty upon such Courts against an otherwise valid excuse.

Id. at 375 n.19. And as the Supreme Court held in *Mayfield*, impartial application of *forum non conveniens* is a valid excuse. *Howlett*, 496 U.S. at 375; *Mayfield*, 340 U.S. at 4. Thus, application of the doctrine of *forum non conveniens* under Virginia Code § 8.01-265 does not violate the Supremacy Clause.

f. The Virginia statute does not violate the Privileges and Immunities Clause because the constitutionality of *forum non conveniens* does not rest on any distinction between "residents" and "citizens".

Brigman premises his petition largely on the theory that the Court's decision in *United Bldg. and Const. Trades Council of Camden and Vicinity v. Mayor and City of Camden*, 465 U.S. 208 (1984)("*Camden*"), which was not a *forum non conveniens* case, overruled *Douglas* and *Mayfield*. Brigman argues that *Douglas* and the line of cases following it through *Mayfield* were premised on a distinction between residency and citizenship that was flatly repudiated in *Camden*. In fact, the opinion in Camden states that the terms "citizen" and "resident" are essentially interchangeable for purposes of analysis of *most cases* under the Privileges and Immunities Clause. 465 U.S. at 216.

But the argument that *Camden* impliedly overruled *Mayfield* has been rejected even more emphatically by the Court. Six years after *Camden*, in *Howlett v. Rose*, the Court extensively analyzed its jurisprudence on the treatment of federal causes of action in state court and reaffirmed its decisions in *Douglas* and *Mayfield*. Still more recently, the Court again reaffirmed *Mayfield* in *American Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994), applying the *forum non conveniens* rule adopted in *Mayfield* to cases arising under the Jones Act, which the Court recognized as largely derivative of the FELA. *Id.* The Court in *American Dredging* also cited with approval *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981).

In *Piper*, the Court specifically upheld the differential treatment of foreign plaintiffs.

> The District Court acknowledges that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which maybe overcome only when the private and public interest factors clearly point towards trial in

> the alternative forum. It held, however, that the presumption applies with less force when the plaintiff or real parties in interest are foreign.
>
> The District Court's distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified. In *Koster [v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)], the Court indicated that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

Piper, 454 U.S. at 255-56. The Court has simply not viewed *Camden* or its predecessor cases as having any relevance to, much less overturning, the jurisprudence of *forum non conveniens* treatment of FELA cases in the state courts.

Not only did the *Camden* case not deal with the issue of *forum non conveniens* in state courts entertaining federal causes of action, neither did the later cases on which Brigman relies, such as *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988), and *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). What is clear from decisions of the Court after *Camden* is the continuing viability of *Douglas*, *Mayfield* and their progeny upholding the constitutionality of dismissal of FELA cases filed by non-residents when such dismissal results from the application of neutral *forum non conveniens* principles.

g. Unlike the law in *Russell v. CSX Transportation, Inc.*, the Virginia statute is a neutral application of the principle of *forum non conveniens.*

Petitioner attempts to give some traction to this attempt to revive a well-settled question by alleging, incorrectly, that his case is "identical" to the case of *Russell v. CSX Transportation, Inc.*, 689 So.2d 1354 (La. 1997). Brigman filed suit under the FELA in Virginia state court. Brigman was not a resident or citizen of Virginia, nor did any of his employment with CSX Transportation take place in Virginia. Consequently, on a properly supported motion by CSX under the Virginia *forum non conveniens* statute, his case was dismissed without prejudice to proceeding in the more convenient forum.

In contrast, *Russell* involved a Florida resident allegedly injured in Georgia, who filed suit in Louisiana under the FELA. 689 So.2d at 1356. The statute in question in *Russell*, La.Code.Civ.P. art. 123B, expressly provided for dismissal on defendant's motion of

> a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based on acts or omissions originating outside of this state.

See 689 So.2d at 1357 (quoting statute). The Supreme Court of Louisiana in *Russell* properly found the Louisiana statute unconstitutional on Supremacy Clause grounds because the statute discriminated against a federally created claim solely on the ground of its federal nature. 689 So.2d at 1357-58.

The Virginia statute, in contrast, merely provide authority to dismiss actions brought by non-residents, under either statue or federal law, if there is a more convenient forum elsewhere. The *Russell* court noted that this Court, in *Mayfield*, had recognized an exception to the general rule. A state could apply the doctrine of *forum non conveniens* to dismiss a FELA claim if the state would deny resort to its

courts in similar state law based cases. There is no constitutional violation as long as the courts applied the doctrine impartially and did not invoke it in such a way as to discriminate against FELA suits. 689 So.2d at 1357.

Thus, *Russell* is not only not "identical," it is entirely different, both on its facts and in the arguments advanced. *Russell*, for example was decided solely on Supremacy Clause grounds. 689 So.2d at 1356. But *Russell* in 1997, like *American Dredging Co. v. Miller* in 1994, did correctly point to the continuing vitality of the principle laid down in *Mayfield*, that a state court can validly apply its local law of *forum non conveniens* if it does so in a consistent and neutral manner. The Court need look no further than *Mayfield*, reaffirmed in *Howlett v. Rose* and *American Dredging Co. v. Miller*, for sufficient authority to deny the petition here.

d. Approval of the nondiscriminatory application of *forum non conveniens* to FELA cases brought in state court is a settled issue and Brigman has raised no grounds for revisiting established case law.

The settled law established by this Court in *Mayfield* and related cases is reflected in the decision of the courts of the states confronting the same issue. In *Norfolk and Western Ry. Co. v. Tsapis*, 400 S.E.2nd 239 (W. Va. 1990), cited by Brigman, the Supreme Court of Appeals of West Virginia held that the doctrine of *forum non conveniens* could be applied to a case brought under the FELA. In so holding, the court noted courts in thirteen other states, including the highest courts in eleven states, that have concluded that the doctrine of *forum non conveniens* can be used to deny access to the courts to nonresident plaintiffs in FELA cases in appropriate circumstances without running afoul of the Privileges and Immunities Clause. 400 S.E.2d at 242 (listing cases). *See also Missouri Pac. R. Co. v. Tircuit,* 554 So.2d 878, 882 (Miss. 1989)(listing cases); Annotation, *Forum Non Conveniens: Circumstances Justifying State Court's Refusal to Take Jurisdiction of Federal Employers Liability Act Proceeding,* 60 ALR3d 964 (1974 & Supp. 1996);

Annotation, *Power of state or state court to decline jurisdiction of action under Federal Employers Liability Act*, 43 ALR2d 774 (1955 & Supps. 1992, 1996).

Although the denial of certiorari does not indicate any view on the merits of the case, the Court has denied the writ in four cases upholding the application of *forum non conveniens* in FELA cases against challenge on privileges and immunities grounds. *Great N. Ry. Co. v. Superior Court*, 90 Cal.Rptr. 461 (Cal.App. 1970), *cert. denied sub nom., Curtin v. Superior Court*, 401 U.S. 1013 (1971); *Vargas v. A.H. Bull S.S. Co.*, 135 A.2d 857 (N.J. 1957), *cert. denied*, 355 U.S. 958 (1958); *Atchison, Topeka & Santa Fe Ry. Co. v. District Court*, 298 P.2d 427 (Okla.), *cert. denied*, 352 U.S. 879 (1956); *Price v. Atchison, Topeka & Santa Fe Ry. Co.*, 268 P.2d 457 (Cal.), *cert. denied*, 348 U.S. 839 (1954). Taken in light of the line of cases before and after *Mayfield*, the case law shows conclusively that the question of the power of a state court to neutrally apply *forum non conveniens* to cases arising under the FELA is not only settled, but also that a large body of case law rests on the continuing viability of this principle. Clearly, the Virginia statute squares with a consistent and well-developed body of authority so that its constitutionality is beyond practical question.

2. The Limitation on the Discretion of the Court in Va. Code § 8.01-265 with Respect to Certain Actions by Nonresidents Does Not Discriminate Against Federal Causes of Action.

Brigman next argues that Va. Code § 8.01-265 impermissibly discriminates against federal causes of action because certain common law claims by nonresidents are not subject to the same risk of *forum non conveniens* dismissal as others, including FELA claims. Va. Code § 8.01-265 states in relevant part: "The provisions of (i) of this section shall not apply to causes of action which accrue under § 8.01-249(4)." Va. Code § 8.01-249(4) provides:

> The cause of action in the actions herein listed shall be deemed to accrue as follows:
>
> 4. In actions for injury to the person resulting from exposure to asbestos or products containing asbestos, when a diagnosis of asbestosis, interstitial fibrosis, mesothelioma, or other disabling asbestos-related injury or disease is first communicated to the person or his agent by a physician. However, no such action may be brought more than two years after the death of such person.

Thus Va. Code § 8.01-249(4) creates a special rule of accrual for asbestos cases controlling the application of the general statute of limitations in Va. Code § 8.01-243, which provides:

> Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues.

Reading these statutes together, it is clear that the Virginia General Assembly has withheld from the exercise of the court's discretion under the general *forum non conveniens* statute the power to dismiss a narrow class of actions filed by nonresidents. Because Virginia does not have a statutory cause of action for injury to the person, *see* Va. Code Title 8.01, ch. 3, art. 3, it is equally clear that the exception refers to common law tort claims for personal injury.

The discrimination that the Supremacy Clause prohibits is discrimination against a federal cause of action because of its federal nature. *Herb v. Pitcairn*, 324 U.S. at 123. The Virginia statute distinguishes between residents and nonresidents, which is clearly permissible, and between one narrow class of personal injury actions and all other actions, whether state or federal, and whether based on

common law or statute, which is also clearly permissible. Brigman attempts to suggest that his case represents an impermissible construction of the *forum non conveniens*, but the Supreme Court of Virginia held under the prior version of § 8.01-265, claims under the Federal Employers Liability Act are treated no differently from any other case. *Norfolk and W. Ry. Co. v. Williams*, 239 Va. 390, 394, 389, 389 S.E.2d 714, 717 (1990).

The lack of discrimination against FELA claim under Va. Code § 8.01-265 is perhaps best illustrated by the fact that a FELA case brought in the courts of the Commonwealth may be less likely to be transferred or dismissed than the same case brought in federal court, where it would be subject to the more liberal transfer provisions of 28 U.S.C. § 1404(a). *Ex parte Collett*, 337 U.S. 55, 70-71 (1949). *See also Mayfield*, 340 U.S. at 5 (Jackson, J., concurring) ("Certainly a State is under no obligation to provide a court for two nonresident parties to litigate a foreign-born cause of action when the Federal Government, which creates the cause of action, frees its own courts within the State from mandatory consideration of the same case.")

3. No Reasonable Construction of Va. Code § 8.01-249(4) Can Bring Claims Under the Federal Employers Liability Act Within its Terms.

Finally, Brigman argues that the statutory language in Va. Code § 8.01-265 referencing Va. Code § 8.01-249(4) was intended to encompass Federal Employers Liability Act claims asserting personal injury from exposure to asbestos. Such a construction exceeds what the plain language of the statutes can bear. Had the legislature intended to favor claims under the Federal Employers Liability Act, it certainly knew how to do so. The issue of *forum non conveniens* treatment of FELA claims was hardly unknown in Virginia as the Supreme Court of Virginia's

rulings in *Caldwell v. Seaboard System R., Inc.*, 238 Va. 148, 380 S.E.2d 910 (1989), *cert. denied*, 493 U.S. 1095 (1990), and *Norfolk and W. Ry. Co. v. Williams* show.

The operation of the same Supremacy Clause that Brigman invokes precludes Virginia from legislating substantively with respect to federally created causes of action. In fact, the FELA differs from Virginia law in that it has a distinct rule of accrual. Rather than a diagnosis provision like Va. Code § 8.01-249(4), a cause of action accrues under FELA when the plaintiff becomes or should have become aware of his injury. *See Townley v. Norfolk and W. Ry. Co.*, 887 F.2d 498, 501 (4th Cir. 1989). The federal courts have specifically rejected the diagnosis standard under the FELA. *Emmons v. Southern Pac. Transp. Co.*, 701 F.2d 1112, 1122 (5th Cir. 1983). Furthermore, the FELA has a statutory three-year limitations period, 45 U.S.C. § 56, as opposed to the two-year statute that applies to cases subject to Va. Code § 8.01-249(4).

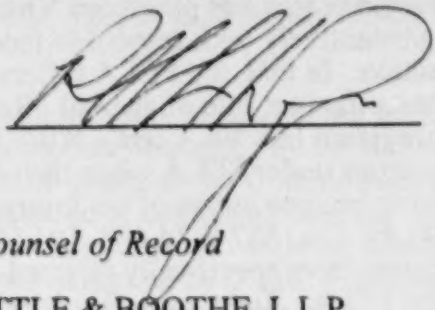
There is no reasonable reading of the statute that can show that the Virginia General Assembly intended to include FELA cases arising from asbestos exposure with common law personal injury cases arising from asbestos exposure, particularly where the latter are subject to the statute of limitations and the rule of accrual that the Virginia Code controls, while the former arise under an entirely different body of law promulgated by a different sovereign and having a different and distinct statute of limitations. In the absence of any reference, express or implied, to FELA cases, the question of the construction of Va. Code § 8.01-265 is purely a question of state law.

CONCLUSION

Brigman merely seeks to evade the natural and logical application of *forum non conveniens* in a manner long approved under the precedents of this Court. Brigman should not be heard to complain when ordinary application of the controlling authority results in the dismissal of his case without prejudice to its being refiled in the more convenient forum. Brigman has failed to demonstrate anything other

than constitutionally sound and familiar principles of law being applied in a fair and consistent manner. Therefore, the petition for writ of certiorari should be refused and the judgment of the trial court allowed to stand.

CSX TRANSPORTATION, INC.

By: 

E. Duncan Getchell, Jr., *Counsel of Record*
Robert L. Hodges
McGUIRE, WOODS, BATTLE & BOOTHE, L.L.P.
One James Center
Richmond, Virginia 23219
(804) 775-1000